

To: Matt McClincy, DEQ

From: Deb Yamamoto, Unit Manager
Kristine Koch, Portland Harbor RPM

Re: Review of DSL Proposed ARARs for Portland Harbor Superfund Site
submitted by Lore Bensel (Assistant Attorney General), dated August 4,
2014

Date: December 16, 2014

EPA and its technical consultants reviewed the Bensel email. From our review, some additional removal and fill statutory and regulatory provisions requiring mitigation for the reasonably expected adverse effects of remediation actions were considered ARAR. Attached is a revised ARAR Table 2.2-3b reflecting the additional ARARs in the “action-specific” list. However, not all of the references provided were considered to be ARAR. Below is a list of the citations proposed by DSL that EPA does not consider ARAR and the reasons why.

1. ORS 196.810 – requires DSL permit for any amount of removal or fill in waters designated as Essential Indigenous Anadromous Salmonid Habitat (ESH). [We note all of the Lower Willamette is ESH].

Response: Not ARAR. This statutory reference only discusses when a permit is required which is a procedural requirement. There is no substantive environmental criteria contained in the statutory reference. EPA has identified DSL regulations that require compensatory mitigation as ARAR, and those regulations provide that mitigation is required for any amount of removal or fill in ESH.

2. DSL said that all of the “supporting rules” to ORS 196.825(5) should be added as ARAR.

Response: We agree most of the regulations are ARAR, but not all. Those regulations not ARAR are:

695 – Administrative Protection for CWM – procedural – Not ARAR -- CERCLA Order or CD will be the legal, enforcement tool for mitigation required due to loss of habitat from cleanup actions

700 – Financial Security for CWM sites – procedural – Not ARAR -- CERCLA Order or CD will be the legal, enforcement tool requiring financial assurance for the cleanup and O&M

705 – Contents of CWM plans – procedural – Not ARAR- Remedial Design documents will document the final compensatory mitigation calculation vis a vis

habitat loss and the mitigation project (likely will include final ESA BA and if necessary BO)

3. It is DSL's understanding that there may be one or more mitigation banks associated with the cleanup – Therefore, they proposed that OAR 141-085-0720 through 740 should be ARAR.

Response: Not ARAR -- no mitigation banks as defined by 404(b)(1) regulations are included in remedial alternatives in the FS or will be approved by the CERCLA program through ARAR compliance approval.

The CERCLA ROD will require PRPs to mitigate for unavoidable loss in implementing the CERCLA remedy to comply with ARARs. If there is a pre-approved 404 mitigation bank (approved through the USACE/DSL IRT process), that is otherwise acceptable as mitigation for Portland Harbor remedial impacts, EPA may agree PRPs can buy credit in such pre-approved bank to satisfy their mitigation requirement. However, if no pre-approved 404 mitigation bank exists in the Portland Harbor service area, or is otherwise acceptable as mitigation for Portland Harbor remedy impacts, PRPs will have to develop their own mitigation projects which will be a component of the remedial action under the ROD and consent decree.

4. OAR 141-085-0765 – authorized by 196-825(5) compensatory non-wetland/non-tidal waters mitigation regulation. DSL asserts such regulation applies to removal and fill in the Lower Willamette River.

Response: The Willamette River is a tidal water. Additionally, there likely is wetlands on some of the river banks on which EPA may take response action under the ROD. However, EPA has no information that there are non-wetland or non-tidal waters within the Portland Harbor site that could be impacted by the cleanup. Without more information regarding how this regulation may be applicable to the Portland Harbor cleanup, OAR 141-085-0765 has not been identified as ARAR.

5. Lower Willamette River Management Plan – codified at OAR 141-080-0105.

Response: DSL did not explain how the Plan is an ARAR for the Portland Harbor cleanup other than the Portland Harbor site is located in the planning area of the Plan. The Plan's purpose as stated at page A-1, Executive Summary is to guide "all new and existing developments" within the lower 17 miles of the Willamette River. The CERCLA cleanup is not a development project, but a remediation project of existing contaminated media. The decision as to whether there is risk and if remediation is necessary is made under CERCLA, not subject to permitting by DSL.

Additionally, the Plan does not address environmental cleanup. The Plan explicitly waives all general conditions and provisional requirements for hazardous materials clean-up on page F-29. DSL stated that the Plan establishes standards, requirements, criteria, or limitations for removal or fill activities within the Lower Willamette River, and pointed to general conditions required in all removal or fill permits authorizing activities in the Lower Willamette River found on pages F-15-19 of the Plan. Notwithstanding such conditions are waived by the Plan itself, the general conditions listed on those pages were not substantive standards or criteria for compensatory mitigation or related to environmental standards for cleanups.

DSL's mitigation regulations have been identified as ARAR independent of this Plan. The Plan does not appear to add or supplement DSL regulations on compensatory mitigation that are identified as ARAR.

6. ORS 196.825(1)(a) and (b) – DSL proposed these statutory provisions should be added to the list of because they are the primary standards for when DSL issues a removal or fill permit.

Response: From our review Subsection (1) (a-b) do not contain clear environmental standards or criteria for achieving cleanup. Subsection (1)(b) mentions preserving the use of waters for navigation, fishing and public recreation. This general policy goal is not more stringent than the Clean Water Act's mandate to protect waters for such beneficial uses nor the Rivers and Harbors Act.